What not to share

The perils of providing confidential mediation briefs to experts, and what to do when the other side crosses the line

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You did some very impressive work. You compiled all of your strongest liability and damage evidence and put it in a comprehensive, full-color package for the defense lawyer and the insurance company – compelling documents, damning deposition admissions, heart wrenching family photos from happier times. Cloaked in confidentiality, you laid all of your cards on the table, even going so far as to candidly discuss the weaknesses in your case. You negotiated in good faith and tried your best to be reasonable. Yet, despite your best efforts and your willingness to accept $X, had it only been offered, your mediation was unsuccessful.

You're going to trial.

The defense lawyer's in the same boat. She expected to settle the case, but her carrier took a hard line and refused to offer fair value. She speaks with a couple of experts to gauge their interest and preliminary opinions. They could help her case, but the carrier is complaining about expenses and the economics of the case don't really justify the cost of having the experts review the voluminous discovery responses and deposition testimony. If only she could distill all of the key evidence in the case into one convenient package for the experts to get up to speed quickly and inexpensively. To accomplish this goal, she takes the easy way out and sends them your mediation brief.

A few weeks later, you depose the first expert and discover that the expert has reviewed your mediation brief. What do you do?

Legal: All materials submitted as part of mediation are to be kept confidential

California has a strong, inflexible statutory and public policy to preserve the confidentiality of mediation communications. Evidence Code sections 1115 through 1128 provide protection for the confidentiality of mediation proceedings, including all discussions and all materials submitted for mediation. Evidence Code section 1119 provides:

Except as otherwise provided in this chapter:

> No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

There is a strong public policy in favor of protecting the confidentiality of settlement discussions, in order to facilitate free and frank discussions during mediations. As the California Supreme Court emphasized:

> [C]onfidentiality is essential to effective mediation because it promote[s] "a candid and informal exchange regarding events in the past. . . . This frank exchange is achieved only if participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes." [Citations.]

(*Rojas v. Superior Court* (2004) 33 Cal.4th 407, 415.)

Further, Section 1119 protects the drafting attorneys' work product – their mental impressions and evaluation of the case – from being revealed to third parties, including experts and consultants. (Code Civ. Proc. § 2018.020.)

Section 1119 protects both the parties' mediation discussions and other materials prepared for the mediation. In *Rojas*, *supra,* a building defect case where defendants had provided photos and expert reports at mediation, defendants refused to produce these materials in discovery. The Supreme Court held that the mediation confidentiality for "writings" applied to witnesses' statements, analyses of raw test data, and photographs prepared for mediation. The Supreme Court considered the Law Review Commission's comments on section 1119 and rejected the idea that expert reports prepared for mediation were excepted from confidentiality protection:

> These materials show that, in making its recommendation regarding mediation confidentiality, the Commission specifically considered the discoverability of both expert reports and photographs and drafted its proposed confidentiality provisions to preclude discovery of such reports and photographs if they were 'prepared for the purpose of, in the course of, or pursuant to, a mediation.'

(*Rojas, supra,* 33 Cal.4th 407, 420.)

Under the holding in *Rojas,* all of the materials provided during mediation, including expert reports, are protected materials that are not to be revealed without the consent of the propounding party. (See also *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137 (discovery of statements made at mediation not allowed); *Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court* (1996) 51 Cal.App.4th 233 (public policy considerations precluded discovery of the terms of a confidential settlement attorneys achieved for other clients.)

In another case, the California Supreme Court held that an expert witness and testimony should have been excluded, because he relied on a privileged peer-review committee record in a medical malpractice action. (*Fox v. Kramer* (2000) 22 Cal.4th 531). "When, as here, an expert has relied on privileged material to formulate an opinion, the court may exclude his testimony or report as necessary to enforce the privilege." (*Id*. at 541.)

Mediation confidentiality cannot be unilaterally waived

Evidence Code § 1119 is not a "privilege," but rather an evidentiary exclusion, a declaration that no evidence of any kind presented or made in a mediation "is admissible or subject to discovery." Unlike the attorney-client privilege, mediation confidentiality cannot be unilaterally waived. (Evidence Code §§ 912, 952-954, 1115 et seq.; *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 585-588). This public policy is carried forward and underscored in §§ 1120 and 1121. An expert witness is simply not to be given access to mediation materials.

Although there is no California decision precisely relating to such use of mediation materials, that proscription was emphatically underscored in a Michigan federal decision, *Irwin Seating Co. v. International Business Machines Corp.*, 2007 U.S. Dist. LEXIS 10472 (W.D. Mich. 2007).[1] In *Irwin Seating*, the plaintiff had provided its expert witnesses with copies of the defendants' mediation brief and exhibits. The magistrate struck the expert witnesses, and the district court adopted the findings and conclusion:

> The Magistrate Judge further found that, regardless of Plaintiff's intent in disclosing the documents, the experts had received confidential information. The Magistrate Judge concluded that no adequate means existed for undoing the experts' improper knowledge. As the Magistrate Judge noted, the facts upon which an expert relies are not required to be admissible. However, the factual basis for the expert's opinion is subject to inquiry and cross-examination. Fed.R.Evid. 703. Because the information in issue is confidential, Defendants will be unable to fully challenge the experts' assertions that their opinions were not influenced by confidential settlement knowledge.

(2007 U.S. Dist. LEXIS 10472, at 9.)

The reasoning of the *Irwin* case is consistent with California precedent.

Finally, and significantly, the California Supreme Court has emphatically reaffirmed the sanctity of mediation confidentiality, even in a legal malpractice context, in which a former client sued his lawyer for claimed malpractice during a mediation and was precluded from testifying about *what his own lawyer said to him* during the mediation! In *Cassel v. Superior Court* (2011) 5 Cal.4th 113, the Supreme Court confirmed that the Legislature crafted a confidentiality statute that broadly protected communications in anticipation of, during, and concerning a mediation:

> In order to encourage the candor necessary to a successful mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding. With specified statutory exceptions, neither "evidence of anything said," nor any "writing," is discoverable or admissible "in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which . . . testimony can be compelled to be given," if the statement was made, or the writing was prepared, "for the purpose of, in the course of, or pursuant to, a mediation…." (Evid. Code § 1119, subds. (a), (b).) "All communications, negotiations, or settlement discussions by and between participants in the course of a mediation … shall remain confidential." (*Id*., subd. (c).) We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected.

(Citations omitted; *Id.* at 117.)

The Court further held:

> It follows that, absent an express statutory exception, all discussions conducted in preparation for mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure. Plainly, such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants.

(*Id.* at 129.)

Quite simply, confidential mediation materials are to remain confidential at all costs.

Reference to mediation materials at trial is reversible error

In keeping with the strong public policy in favor of confidentiality of settlement, Evidence Code section 1128 provides that the improper use of, or reference to, mediation materials at trial is an "irregularity" in the proceedings that constitutes grounds for vacating or modifying the decision:

> Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure.[2] Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

(Evid. Code § 1128.)

The California Supreme Court has approved the vacating of judgment in a case in which the judgment was based on the use of confidential mediation materials. In *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, the trial court had imposed sanctions of more than $30,000 against defendants and their attorney for failing to bring their expert witnesses as required during court-ordered mediation. The Supreme Court held that the association's motion for sanctions and trial court's consideration of the motion and supporting documents, which recited statements made during the mediation session, violated statutes mandating confidentiality of mediation proceedings:

> Inasmuch as the superior court's sole basis for imposing sanctions on Bramalea/Stevenson was allegations in and the material offered in support of the motion for sanctions, it is clear that reference to the mediation materially affected their rights and that the Court of Appeal did not err in setting aside the order imposing sanctions.

(*Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 18.)

Thus, it would be reversible error for an expert to be permitted to offer opinions at trial that are based upon that expert's review of documents exchanged during a mediation.

Experts who have reviewed confidential materials should be excluded under the evidence code

Providing confidential mediation materials to an expert in contravention of Evidence Code section 1119 is improper; it provides illegal bases for the expert's opinions. Thus, opinions based on these confidential materials should be excluded.

Evidence Code section 803 provides:

> The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion[3] after excluding from consideration the matter determined to be improper.

Evidence Code section 801(b) precludes an expert from using illegal materials as a basis for an opinion:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: . . . (b) Based on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

(See, Law Revision Committee Comment on Evid. Code § 801 ["[A]n expert may not base his opinion upon any matter that is declared by the constitutional, statutory, or decisional law of this State to be an improper basis for an opinion"; *Behr v. Santa Cruz County* (1959) 172 Cal.App.2d 697, 705 (fire investigator's opinion excluded as based on improper matter – statements of bystanders).)

Since Evidence Code section 1119 precludes the revelation of confidential mediation materials (and Evidence Code section 1128 subjects tribunals to the sanction of vacating any judgment based on such materials), it follows that an expert is "precluded by law from using such matter as a basis for his opinion."

Conclusion

You've located among the expert's materials a copy of your mediation brief. Since it's likely that the defense lawyer doesn't think she's done anything wrong, you should mark the brief as one of many exhibits and coyly look at it to see whether it's been highlighted or the expert has made written notations upon it.

To avoid detection, you should also identify a number of documents in the expert's file – including the mediation brief – and ask the expert what information he gleaned from each one. In a perfect world, the expert will fill the record with the numerous items of information he gleaned from the mediation brief and could not locate anywhere else in the record. Repeat this same routine with all of the experts who received your brief.

In the above scenario, you should be able to draft a motion in limine to exclude the expert(s). If you can make a compelling case that the opinions are largely based on the review of confidential materials exchanged at your mediation, you may very well be able to have the expert(s) excluded.

CAVEAT: It should go without saying that what isn't good for the goose isn't good for the gander, either. Don't cut corners on your end by giving the other side's mediation briefs to your experts. Spend a little extra money to do it right and preserve the viability of mediation confidentiality for future litigants.


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Endnotes

[1] *Irwin* is cited with approval for this proposition by the US District Court for the Central District of California in *Maury Microwave, Inc. v. Focus Microwaves, Inc.*, 2012 U.S. Dist. LEXIS 189290, fn 129.

[2] C.C.P. section 657 enumerates the grounds for vacating the judgment of a trial court. C.C.P. section 657(1) notes that an "irregularity in the proceedings" is a ground for vacating the judgment.

[3] A party may also recover monetary sanctions when its opponent discloses confidential mediation documents to its experts. *Tokerud v. Pacific Gas & Elec. Co.*, 25 Fed. Appx. 584 (9th Cir. 2001) (unpublished).